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Supreme Court, U.S.
FILED

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NO: _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999

MILOS J JIRICKO MD PETITIONER

v.

MOSER & MARSALEK PC RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES APPEALS COURT FOR EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MILOS J JIRICKO MD
10701 HUNTING LANE
ROCKVILLE MD
301 610 0833

49pp

QUESTION PRESENTED

Whether, the United States citizen's Constitutional rights to due process of law and,

Whether, the direct written mandate of the United States Supreme Court and the Federal Rules of Civil Procedure may be bypassed without the Supreme Court intervention.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999

Petitioner respectfully prays that a writ of certiorari issue to review a verdict of Court of Appeals for Eighth Circuit, affirming judgment of the United States district court for Eastern Missouri.

OPINIONS BELOW

The Order of the Court of Appeals for Eighth Circuit appears in Appendix A.

JURISDICTION

Court of Appeals Order issued on June 24, 1999.

Jurisdiction of the Supreme Court is respectfully invoked under 28 U.S.C. & 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

No person shall be deprived of life, liberty or property, without due process of law, Constitution Amendment V.

In suits at common law, where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved, United States Constitution Amendment VII.

Federal Rules of Civil Procedure

STATEMENT OF THE CASE

Petitioner respectfully prays that a writ of certiorari issue to review verdict of Court of Appeals for Eighth Circuit affirming judgment of the United States district court for the Eastern Judicial district St. Louis, Missouri on March 1, 1999, case No: 4-98CV01893 CDP.

I respectfully filed lawsuit No: 93-398 on June 15, 1993 at the federal court in East St. Louis, Illinois. The case No:93-398 was a common law tort action, involving fraud, breach of fiduciary duties, legal malpractice and conversion. This case was erroneously dismissed on September 19, 1994.

On August 29, 1997, I respectfully filed case No:4:97CV1787 ERW at the federal court in St. Louis, Missouri under federal jurisdiction, alleging action under the United States Constitution and common law tort claims of misfeasance, fraud, abuse of process, collusion & conspiracy. Defendants of the lawsuit No:4:97CV1787 ERW, federal officer Stiehl and lawyers Plegge & Horgan were held immune from the Complaint by the Court Order and the case was dismissed in

the pre-trial proceedings by an Order dated April 8, [App. C].

On November 12, 1998 I filed Complaint No:4-98CV01893

CDP of which some Excerpts are submitted as follows:

5. Defendants Moser & Marsalek P.C. by its officers Brian R. Plegge executed a document [Exhibit 1] and filed it at the federal court in East St.Louis on November 12, 1993 requesting court's action. This document has been endorsed by Moser & Marsalek P.C. and it is signed by Brian R. Plegge, 200 N. Broadway, Suite 700, St.Louis, Missouri 63102, [Exhibit 1].

6. Defendants Moser & Marsalek P.C. and its expert officers and including Brian R. Plegge knew full well that questions of breach of fiduciary duties presented by the common law action No:93-398 at the federal court [Exhibit 2] constitute question of material fact, a jury question, [David Welch v. Erskine & Tulley, 250 C. Rep. 339].

7. Defendants Moser & Marsalek P.C. and its expert officers and including Brian R. Plegge knew full well that questions of damages is question of material fact, a jury question as a matter of law; [Patterson v. Coughlin, 905 F2d 564].

8. Defendants Moser & Marsalek P.C. and its expert officers and including Brian R. Plegge knew full well that questions of material facts, as presented by the common law case No:93-398 at the federal court [Exhibit 2], questions of breach of standard of care due to Dr.Jiricko [Exhibit 3] and the questions of damages they themselves maliciously raised [Exhibit 1], constitute the very existence of a genuine issues of fact which, at the federal court must be resolved by the jury trial; United States Constitution, Amendment VII; [F.R.C.P., Rule 38; Patton v. U.S.,281 U.S. 280].

9. Moser & Marsalek P.C. and its officers intentions, aim and actions were blatantly malicious and ulterior; while acting under the camouflage of the Exhibit 1, Moser & Marsalek P.C. officers actual objective and stratagem was to willfully and maliciously trespass upon and to deprive Dr.Jiricko of his fundamental rights, of his property and liberty and cause harm in which they succeeded blatantly violating the common law duties they owed to Dr.Jiricko.

10. Moser & Marsalek P.C. and its officers, Plegge & Horgan knew full well that Plaintiff Dr.Jiricko cannot be infringed upon or deprived at the federal court of his rights and including of his right to a jury trial upon his common law case No:93-398, under the pretext of Federal Rules [Leimer v. Woods, 196 F2d 829].

Federal rules ... "shall not abridge, enlarge, or modify any substantive right".., [28 U.S.C. & 2072 (b)].

11. In response to Exhibit 1 plaintiff filed 'Petition':

Also pending is plaintiff's 'Petition for Court Order To Show Cause and for Order to Conduct Public Hearing'. The motion rails at various defendants for seven pages accusing them of fraud, obstruction of justice and other contumacious behavior. In the end, it looks like a motion pursuant to Fed.R.C.P.,11. Plaintiff will have his opportunity for a public hearing, that being a jury trial, if the case is not otherwise disposed of. His present motion for a public hearing is, therefore, denied. [Judge Philip M Frazier,U.S. District court Order, Feb 24,1994].

12. Plaintiff's right to proceed against Moser & Marsalek P.C. on the issues of common law tort is under the law independent and several of the Plaintiff's legal rights to proceed against its officers B. R. Plegge and P. J. Horgan, attorneys.

13. The defendants Moser & Marsalek, P.C, third party to a law suit No:93-398 is under the law jointly and severally liable with its attorneys officers for committing torts and improper exercise of its officers authority and there is no immunity to Moser & Marsalek P.C..

Tort, improper exercise of authority, misfeasance, malfeasance.

14. Plaintiff incorporates all preceding paragraphs and all Exhibits attached to this Complaint as if fully re-written herein.

15. Officer Plegge while acting on behalf of Moser & Marsalek P.C. had a common law duty to Dr.Jiricko to fully regard his rights and property and to use that which he controls as not to injure Dr.Jiricko; the law holds Moser & Marsalek and its officers, including the officer Plegge liable for their misfeasance, malfeasance and improper exercise of authority, [White v. McCoy Co., 101 S.W.2d 763].

16. Defendants Moser & Marsalek P.C., the third party of the law suit No: 93-398 and its attorneys officers breached their common law duties they owed to Dr.Jiricko by maliciously and in bad faith instigating the court's action upon the plaintiff case No:93-398 by filing fictitious papers [Exhibit 1], a misfeasance, an ulterior and malicious act of a stratagem, willfully directed to deprive Dr.Jiricko of his fundamental rights and of liberty, including of his right to the jury trial upon the case No:93-398 and of his property and they succeeded to Dr.Jiricko's injuries.

17. Under the law, Plaintiff Dr.Jiricko has a right of action against the Moser & Marsalek P.C., a joint and several tortfeasor and Moser & Marsalek P.C. is jointly and severally liable for the injuries caused to Plaintiff Dr.Jiricko by its officers tortious acts, however many individuals or forces have ultimately participated in Dr.Jiricko's injuries and harm.

Collusion and Conspiracy of Moser & Marsalek officers Plegge & Horgan and outside individuals to trespass upon Dr.Jiricko rights and to deprive him of his property and a cover up.

18. Plaintiff incorporates all preceding paragraphs and all Exhibits attached to this Complaint as if fully re-written.

19. On September 19, 1994 federal officer Stiehl acted in the furtherance of collusion and conspiracy to consummate Moser & Marsalek P.C. officers stratagem to deprive Dr.Jiricko of his rights and of his liberty and including of his right to the jury trial upon his case No:93-398 and of his property.

20. On September 19, 1994, acting in the furtherance of collusion and conspiracy of Plegge, Horgan and Stiehl directed to commit wrongful act upon the plaintiff's rights and upon his property and to deprive Dr.Jiricko of his fundamental rights and his property, the officer Stiehl, acting under the pretext of the Exhibit 1, assented, as a cover up for Moser & Marsalek P.C. officers willful misfeasance, to substitute their bogus grounds [Exhibit 1] with new grounds, [Exhibit 4], grounds unrelated to the matter submitted in the Exhibit 1, grounds unknown to plaintiff Dr.Jiricko, grounds untested by any cross examination and with no notice or opportunity given to Dr.Jiricko to respond - officer Stiehl acting in the furtherance of conspiracy and collusion instantly exterminated the case No:93-398 at will, and with no hearing or a jury trial, Stiehl consummated the conspiracy by depriving Dr. Jiricko of his rights and of his property at will, in the violation of the district court own rules, arbitrary and unlawfully, causing injuries...;
[Excerpts, Case No:4-98CV01893 CDP].

REASONS FOR GRANTING THE PETITION

Truth is like a torch.
The more it's shook,
The more it shines; Sir William Hamilton

(I)

The United States Supreme Court announced:

Right to procedural due process is absolute;
[Carey v. Piphus, 435 U.S. 247].

United States Supreme Court issued and safeguards Federal Rules of Civil Procedures.'These rules govern the procedure in the United States district courts in all suits' [F.R.C.P., Rule 1]. Federal Rules of Civil Procedure are equally binding upon a citizen, a litigant pro se, as they are upon the court held by the Supreme Court.

The purpose of Court Rules is to insure uniformity and timely adjudication..., regulations bind with equal force guaranteeing to all alike a trial under the general law of land,
[Duncan v. Louisiana, 391 U.S. 170].

Petitioner filed Complaint No:4-98CV01893 CDP at the district court in St. Louis, Missouri on November 12, 1998, Honorable Judge Perry presiding. Jurisdiction of the Court was under 28 U.S.C. Section 1332. On December 3, 1998 the defendants responded and filed no pleading, but a motion...

"COMES NOW defendants Moser & Marsalek PC and for its Motion to dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(B); in addition, plaintiff's current complaint is barred by the doctrine of res judicata and collateral estopel".
[Motion to Dismiss, Dec.,3, 1999].

Federal Rules of Civil Procedure Rule 8 provide:

(b) Defenses... A party shall state ...the party's defenses to each claim asserted...
(c) Affirmative Defenses. In pleading to a preceding pleading a party shall set forth...'res judicata'...; [FRCP, Rule 8].

Under rules of civil procedure the pleadings consist of complaint, an answer, a reply to a counterclaim, an answer to a cross claim, a third party complaint and a third party answer, Fed.R. Civ.P 7(a); [Black's Law dictionary].

Federal Rules, therefore, strictly mandate that if a party wishes to raise the 'affirmative defense', new issue at the federal court, it shall do so by the pleading. Such rule is substantial constitutional protection for this litigant pro se. Defendant, acting under the Federal Rules is required to submit the affirmative defense by the responsive pleading under the Rule 8 for a distinct purpose; the Rule specifically require of the claimant to put at issue the factual allegations of the complaint, herein alleged violations of common law No:4-98CV01893 CDP into an adversary proceedings upon the facts alleged and further, to enable the claimant to fully evidence before the

Court with clarity and certainty that there was (*) final judgment on merits in controversy "A" and that (*) the parties and the claims in "B" are identical to the parties and claims in "A" - all being mandatory to empower the Court to look at new issues, that is whether plaintiff's claim No:4-98CV01893 CDP may be barred by the doctrine of claim preclusion; [Constituion Art III, 28 U.S.C. & 1332 ; F.R.C.P., Rule 1; 8].

The conclusive effect of a judgment on the merits as res judicata is limited to the same cause of action;
[1B Moores F. Practice, 0.410[1] at 1152].

The district court held by Judge Perry, No:4-98CV01893CDP.

"In its motion to dismiss, defendant argues that plaintiff's complaint is barred by res judicata".
"In its March 1, 1999 Memorandum and Order this court granted defendants' motion to dismiss on the ground the plaintiff's Complaint was barred by the doctrine of claim preclusion".

The grant of the Claim Preclusion speaks for itself; [App. B].

Here, there are allegations averred by the Complaint No: 4-98CV01893 CDP, however, no requisite pleading under the F.R.C.P., Rule 8.

Here, the federal court dismissed case No:4-98CV01893 CDP with prejudice apparently under the Claim preclusion doctrine, while at the same time ignored the burden of proof fully placed upon the claimant and the commands placed upon the defendant and the Court by Federal Rules of Civil Procedure, Rules 1; 8; 12(d).

Here, Federal Rules of C. Procedure and including the Rule 1, equally binding upon the party as they are upon the Court and, Dr.Jiricko's, litigant's pro se constitutional rights to the uniformity of federal court procedure and to alike trial under the general law of land were reduced to an empty paper.

Here, plaintiff pro se, Dr.Jiricko, was selectively denied his guaranty due to him under the laws and was deprived of his right to equal protection under the United States Constitution, Amendment V.

When the federal court has established public principles and standards in our system of jurisprudence the Court could not proceed without regard to them and the failure to abide by them is denial of due process;
[United States v. Heffner, 420 F2d 809].

Apparently, plaintiff's pro se constitutional due process rights were overlooked because he appeared as a litigant pro se; an outsider, challenging one of the local major law firm.

Moser & Marsalek PC lawyers knew full well that to comply with the Rules and to file the required pleading, and to comply with the law and to provide the requisite burden of proof, showing with clarity and certainty what actually was litigated by prior judgment was endmost unavailing, [Infra at II]; hence they bypassed the law.

> Question as to who may enforce a statutory right are fundamentally different from questions as to who may enforce a right that is protected by the United States Constitution, [Davis v. Passman, 442 U.S. 228]

[b]ecause the right to procedural due process is absolute.., [b]ecause of the importance to organized society that procedural due process be observed, declared in Carey v. Piphus, there is far more involved here than an injury to a single pro se litigant.

I, the Petitioner, most respectfully pray that the Supreme Court of the United States exercises its supervisory powers and upholds the requirements of the Federal Rules of Civil Procedure and the United States Constitution.

(II)

Res judicata may not constitutionally be applied to the case **"B"**, No:4-98CV01893 CDP, when the judgment in previous case **"A"**, No:4 97CV1787 ERW, is not on merits, is void or is based upon the join and several tortfeasors' immunity.

Ambiguous dismissal precludes any application of "Res Judicata" doctrine; [Tamari v. Bache & Co, 637 F2d 1342]. [Montana v. United States, 440 U.S. 147].

Lawsuit "B" No:4-98CV01893 CDP,common law controversy filed under the diversity jurisdiction 28 U.S.C. Section 1332 was dismissed on March 1, 1999 on the grounds of claim preclusion upon the judgment rendered in the case "A", No:4 97CV1787 ERW decided under the federal jurisdiction:

The United States district court for Eastern District of Missouri had jurisdiction over the case No:4 97CV1787 ERW pursuant to 28 U.S.C. 1331;
[Plegge & Horgan to the Appeals Court for 8 CR, at 1].

Facts:

(a) Sworn to case "A", No:4 97CV1787 ERW, filed under 28 U.S.C. 1331 was dismissed in pre-trial stage on April 8, 1998.

Certainly, if the federal claims are dismissed before trial, even thought substantial in a jurisdictional sense, the state claims should be dismissed as well;
[United Mine Workers v. Gibbs, 383 US 715]

When federal claims are disposed of before trial, the state claims should be dismissed without prejudice almost as a matter of course; [Baltimore Orioles v. Major League Baseb. Players, 805 F2d 663]. [Sattler v. Bailey, 400 SE2d 221].

(b) Case "A", No:4 97CV1787 ERW, also averred common law controversy, claims of misfeasance, fraud, abuse of process, collusion and conspiracy;

The plaintiff's allegation against defendants Moser & Marsalek PC is that Brian Plegge and Pat Horgan acting as officers of Moser & Marsalek PC deprived plaintiff of his rights, [Moser & Marsalek's Motion to dismiss Dec.,3, 1998 at 1].

To resolve the violation of these plaintiff's legal rights, "a cause of action" [Baltimore S.S. Co., v. Phillips; 274 U.S. 321], jury trial was constitutionally required and was properly demanded.

The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence; [Jacob v. New York City, 315 U.S.752]. [Byrd v. Blue Ridge Electric, 356 U.S. 525].

(c) Court dismissed case "A", No:4 97CV1787 ERW in the pre-trial stage, denied plaintiff pre se his right to any discovery and his right to present his common law claim to the jury.

It is well established legal principle that no decision may constitute res judicata if the party against whom it is asserted has not had a full and fair opportunity to litigate his claims; [Pirela v. Village of Aurora, 935 F2d 909. [Kremer v. Chemical Construction C., 456 U.S. 461].

Governmental immunity and protection, a personal benefit granted to joint tortfeasors Stiehl, Plegge & Horgan, is expressly applied so there may be no litigation; to say with any degree of veracity that plaintiff pro se, Dr.Jiricko "has had full and fair opportunity to litigate his claims" is only a paradox; [West v. Ruff, 961 F2d 1064].

The action against the private parties accused of conspiring with the judge is not subject to dismissal... [Dennis v. Sparks, 449 U.S. 24].

Conspiracy, which permits finding of liability cannot be simply erased by absence of state, federal actor as defendant or by fact that actor might later raise a successful defense to claim; [Dawn v. Sawtelle, 574 F2d 1].

(d) Plaintiff in the case "A", No:4 97CV1787 ERW is not required under the law to sue all joint and several tortfeasors at the same time. Plaintiff has legal right to file separate lawsuit "B", No:4 98CV01893 CDP, in the federal court under the Constitution Article III, under Amendment I and under the diversity jurisdiction when the defendants, as here, are joint and several tortfeasors, severally and jointly & severally liable; [Restatement, Judgments (Second) & {Ch4/Comment}].

(e) A master, Moser & Marsalek PC, breached his duties owed to Dr.Jiricko, a third person, and thus he is directly liable.

(1)

Court dismissed lawsuit No:4 97CV1787 ERW in the pre-trial stage, denied plaintiff pro se any discovery and **relinquished its jurisdiction** upon the common law tort claims presented by the case No:4 97CV1787 ERW pursuant to the Rule announced in Hurn v. Oursler, 289 US 245.

Federal Judge Webber's Order [App. C] relinquishing his jurisdiction upon the plaintiff's common law tort claims of misfeasance, fraud, abuse of process, collusion, conspiracy and cover up alleged perpetrated by the joint tortfeasors is not on merits and thus it does not preclude a subsequent action upon the same common law tort claims against joint and several tortfeasor, Moser & Marsalek PC; [Moore's Fed. Practice 3D].

United Mine Workers v. Gibbs, 383 US 715; Sattler v. Bailey, 400 SE2d 221; Disher v. Info Res. 873 F2d 136; Pucket v. City of Emmet, 747 P2d 48; McLearn v. Cowen Co., 660 F2d 845].

Grant of Claim preclusion upon the case No:4-98CV01893 CDP is not constitutionally available.

(2)

Court dismissed lawsuit No:4 97CV1787 ERW in the pre-trial stage, denied plaintiff pro se any discovery and the jury trial and declared the **defendants immune** from the Complaint No:4 97CV1787 ERW; [App. C].

Judge Stiehl argues that plaintiff 's complaint must be dismissed because he is protected by judicial immunity. Judges are absolutely immune from suit for damages arising out of performance of their judicial duties, such as plaintiff alleges. Plaintiff's complaint against Judge Stiehl is dismissed.

"...attorneys are protected from suits arising from their actions as officers of the court performing their professional duties"; [App. C] [Brief to 8th CR, Appelees Plegge & Horgan at 9].

Personal defense bar a right of action where a cause of action would otherwise have existed; [Descant v. Adm'rs of Tulane Ed. F., 639 So2d 247].

Such application of law in the case No:4 97CV1787 ERW merely denied the plaintiff's remedy against joint and several tortfeasors Stiehl, Plegge & Horgan; It does not destroy Dr. Jiricko's right of action against Moser & Marsalek, P.C.

The fact that one of the joint & several tortfeasors may not be held accountable by the fact that he has an absolute privilege to act or an immunity from liability the other to the injured party will not operate to exempt the other;[Restatement, Torts 2d]; This is the case when the primary obligor is immune from suit by the injured person; [Restatement, Judgments (Second); {Ch (4) Comments}].

To be sure, the general rule of finality of jurisdictional determinations is not without exceptions. Doctrine of federal pre-emption or sovereign immunity may in some context be controlling; [Durfee v. Duke, 375 US 114].

Grant of Claim preclusion upon the case No:4-98CV01893 CDP is not constitutionally available.

(3)

Court dismissed lawsuit No:4 97CV1787 ERW in the pre-trial stage by declaring the defendants immune from the federal claims, denied plaintiff pro se any discovery, denied plaintiff pro se any opportunity to gather any substantive evidence and erroneously dismissed plaintiffs' common law tort claims by **depriving plaintiff of his constitutional right to a jury trial.** Court Order rendered in the violation of the Federal Rules of Civil Procedure and United States Constitution is void:

Johnson v. Zerbst, 304 U.S. 45; Bass v. Hoagland, 172 F2d 205; Carey v. Piphus, 435 U.S. 247; Windsor v. McVeigh, S.Ct., United States v. Walker, 109 U.S. 258].

A void judgment may be collaterally attacked when attempts are made to enforce it, or in any other context in which recognition of the judgment is sought; [Moore's Fed. Practice].

Attorneys are not exempt from their duties to others; if they employ corrupt and illicit practices, such as identified by the plaintiff's Complaint No:4-98CV01893 CDP and filed against the joint and several tortfeasor Moser & Marsalek PC.

Attorney who has been guilty of fraud, collusion or malicious or tortious act is personally liable to third party who sustains injury in consequence of such wrongful act or improper exercise of authority; [White v. McCoy Land Co, 101 S.W. 2d 763; Stafford v. Muster, 582 S.W.2d 670].

Fact that one of the defendants was an attorney for one of the other defendants did not immunize him from liability for torts committed in person or liability for wrongs done pursuant to an alleged conspiracy joined by him,
[Greenwood v. Mooradian, 290 P2d 955]

The common duty to regard the rights of others is none the less binding upon a person because he happens at the time to be an agent, his common law obligation to so use that which he controls as not to injure another. Agent is personally liable to third person for his own misfeasance and positive wrongs;
[Rising v. Ferris, 216 Ill. App. 252].

Sworn to common law tort claims of the case No:4 97CV1787

ERW required a jury trial. No jury trial was ever held.

Right to jury trial in tort actions brought in federal court is guaranteed by the Constitution; U.S.C.A.Const.Amend.7;
[Chatzicharalambus v. Petit, 73 F.R.D. 417].

This conclusion is consistent with this Court's approach in cases involving wrongful denial of a petitioner's right to a jury trial on legal issues, which is to reverse and remand each case in its entirety for a jury trial rather then to accord the trial courts factual findings collateral estoppel effect;
[Lytle v. Household Manuf., 494 U.S. 552].

Grant of Claim preclusion upon the case No:4-98CV01893

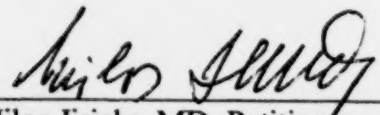
CDP is not constitutionally available.

IN CONCLUSION, I, Petitioner Dr.Jiricko, have respectfully presented that the Supreme Court mandate and the United States Constitution have been disregarded.

I the Petitioner, most respectfully pray that the Supreme Court of the United States exercises its supervisory powers and upholds the prerequisites of the Federal Rules of Civil Procedure and the United States Constitution.

I most respectfully pray that a writ of certiorari issue to review erroneous verdict of Court of Appeals for Eighth Circuit affirming Order of the United States district court for the Eastern Judicial district St. Louis, Missouri.

Respectfully Submitted.



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APPENDIX A

United States Court of Appeals For Eighth Circuit
No 99-2228

Milos J. Jiricko, M. D. Appellant
v.
Moser & Marsalek, P. C. Appellee

Appeal from the United States
District Court for the Eastern District of Missouri.
Moser & Marsalek, P. C. [UNPUBLISHED].

Submitted: June 16, 1999
Filed: June 24, 1999

Before WOLLMAN, Chief Judge, RICHARD S. ARNOLD, and BEAM, Circuit Judges.

PER CURIAM.

Milos J. Jiricko, M.D, appeals the district courts' dismissal of his complaint based on res judicata and the court's imposition of sanctions. After careful review of the record, we conclude that briefing would serve no useful purpose and we affirm for the reasons stated by the district court. See 8th Cir. R. 47A(a).

The Honorable Catherine D. Perry, United States District Judge for the Eastern District of Missouri.

APPENDIX B

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI EASTERN DIVISION
MILOS J. JIRICKO, M.D., Filed .....
Plaintiff

V. No: 4 98CV1893 CDP

MOSER AND MARSALEK, P.C.,
Defendant

Memorandum and Order

This matter is before the Court on defendant's motion to dismiss plaintiff's amended complaint and its motion for protective order. Plaintiff has styled his response to the motion to dismiss as a motion to strike. For the reasons set forth below, the Court finds the motion to dismiss to be well taken, and will grant it and deny the motion to strike. The Court will also deny defendant's motion for protective order. However, pursuant to Federal Rule of Civil Procedure 11, the Court will order plaintiff to show cause why he has not violated the rule and why appropriate sanctions should not be imposed against him.

I. Background

In February 1991, plaintiff filed a complaint in the United States District Court for the Southern District of Illinois, naming as defendants, among others, Illinois Anesthesia, Ltd.,

and Leonard R. Becker, whom plaintiff identified as Illinois Anesthesia's sole shareholder and President; Jiricko v Illinois Anesthesia Ltd No 91CV00092 WDS ("Jiricko I"). The complaint was prepared and filed by Lakin & Herndon, P,C. ("the Lakin Law Firm") plaintiff's counsel at that time. In count five of that complaint, plaintiff alleged conversion, claiming that Illinois Anesthesia and Becker had billed and collected money for services rendered by plaintiff. On July 2, 1991, the Honorable William D.Stiehl of the Southern District granted Illinois Anesthesia's motion to dismiss count five, pursuant to Rule 12 (b) (6), Fed. R. Civ. P., and gave plaintiff thirty days within which to file an amended complaint. In August 1991, the Lakin Law Firm informed plaintiff that it planned to withdraw from its representation of plaintiff. Thereafter, the firm filed a motion to withdraw, and, following a hearing, Judge Stiehl entered an order granting the motion on January 2, 1992. In that order, the judge gave plaintiff thirty days to either (1) obtain new counsel and have that counsel enter his or her appearance, or (2) enter his

appearance pro se. Judge Stiehl also cautioned plaintiff that failure to comply with the order might result in the dismissal of his case for failure to prosecute. After plaintiff failed to comply with the January 2, 1992, order, Judge Stiehl dismissed plaintiff's case for failure to prosecute. Plaintiff took an appeal, challenging not only the dismissal but also the district court's earlier dismissal of count five and the court's granting leave for the Lakin Law Firm to withdraw. On August 27, 1993 the Court of Appeals for the Seventh Circuit affirmed in an unpublished order, Jiricko v. Illinois Anesthesia Ltd., Nos. 92-2613, 92-2682, 1993 WL 326697 (7th Cir. 1993) (referenced in a "Table of Decisions Without Reported Opinions" at 4 F.3d 996), and imposed sanctions upon plaintiff in the amount of $675.00 for filing frivolous motions during the course of the appeal. On June 10, 1993, plaintiff filed a second lawsuit in the Southern District of Illinois, Jiricko v. Lakin & Herndon, PC No. 93-398 WDS ("Jiricko II") In Jiricko II, plaintiff brought suit against the Lakin Law Firm and several of its attorneys, raising the

following three claims: (1) defendants defrauded him by inadequately representing him in Jiricko1; (2) defendants committed malpractice by failing to file a response to the motion to dismiss the conversion count in Jiricko I and by failing to file an amended complaint in that action; and (3) defendants converted the materials contained in his legal file. Attorneys Brian R. Plegge and Patrick J. Horgan represented the defendants in Jiricko II and filed a motion for summary judgment on their behalf. On September 19, 1994, Judge Stiehl granted defendants' motion. With respect to plaintiff's claims of fraud and malpractice, the judge found that plaintiff's claim for conversion in Jiricko I was defeated "not because defendants failed to file an Amended complaint but rather because plaintiff failed to prosecute his claims". Jiricko v. Lakin & Herndon P.C., No. 93-CV-399-WDS (S.D. 111. Sept, 19, 1994), slip op. at 6. Judge Stiehl stated, "At the time the cause of action was dismissed, no ruling had been made on the merits of the conversion claim, and although technically dismissed, plaintiff could have attempted to

amend the complaint to renew this claim,' Id. The judge found that no genuine issues of material fact existed concerning plaintiff's conversion count because defendants had "clearly shown that plaintiff had access to [his] files." Id at 7. Plaintiff again appealed, and the Seventh Circuit again affirmed in an unpublished order. Jiricko v. Lakin & Herndon, P,C,, No. 94-3344, 1195 WL 623825 (7thCir. Nov. 15, 1995) (referenced in a "Table of Decisions Without Reported Opinions at 69 F.3d 539), cert. denied 517 U.S. 1137 (1996). The court of appeals found that because Judge Stiehl granted the Lakin Law Firm's motion to withdraw in January 1992, no attorney-client relationship existed between the firm and plaintiff at the time of the "final dismissal of the conversion claim in June of that year. 1995 WL 623625 at *1. The court thus concluded that plaintiff himself was responsible for the dismissal. Finally, the court, on its own motion, gave plaintiff fourteen days within which to show cause why it should not impose sanctions for filing a frivolous appeal. Id at 2. Plaintiff did not respond to the order to show cause and the court then

issued an order prohibiting plaintiff from filing "any papers in any federal court in the Seventh Circuit, excluding criminal and habeas corpus proceedings "unless he first filed a motion for leave to file attaching certain specified documents, including a sworn affidavit" certifying that the matters raised in the proposed filing are not frivolous and have not been raised by him in prior suits." Jiricko v Lakin & Herndon, PC, No. 93-398 (7th Cir. Jan. 11, 1996), slip order at 1-2. Following the Seventh Circuit Is January 11, 1996, order, plaintiff commenced a new action, this time in the Eastern District of Missouri Jiricko v Plegge, 4:97CV1787 ERW ("Jiricko III"). In Jiricko III, plaintiff, proceeding pro se, named as defendants Plegge and Horgan (i.e., the two lawyers who represented the defendants in Jiricko II and Judge Stiehl and charged that the three conspired to defraud him of his fundamental constitutional rights, wrongfully deprived him of his right to due process and his right to a jury trial, and denied him the equal protection of the laws. Plaintiff based those claims on the following two facts: (1) Plegge and Horgan

filed the summary judgment motion in Jiricko II and (2) judge Stiehl granted the motion. The defendants in Jiricko II filed a motion to dismiss, and on March 25, 1998, the Honorable E. Richard Webber, to whom the case was assigned, held a hearing on that motion.(1'). On April 8, 1998, Judge Webber entered an order dismissing plaintiff's complaint with prejudice. The judge found that Judge Stiehl was immune from suit, Jiricko v. Plegge, No. 4:97CV1787 ERW (E.D. Mo. Apr. 8, 1998), slip op. at 5, and that Plegge and Horgan did not deprive plaintiff of any constitutional rights by submitting a successful motion for summary judgment. Id. at 6. The Eighth Circuit affirmed the dismissal in an unpublished order. Jiricko v. Plegge, No. 98-2096, 1998 WL 761897 (8th Cir. Nov. 3, 1998). On November 12, 1998, plaintiff filed this lawsuit against Moser & Marsalek, P.C., the law firm where Plegge and Morgan work. Plaintiff's complaint alleges that by filing the motion for summary judgment in Jiricko I defendant and its officers breached their common law duty to plaintiff "to fully regard his rights and property" and engaged in a

"malicious act." The complaint further charges that defendant and its officers colluded and conspired with Judge Stiehl in Jiricko II to deprive plaintiff of his constitutional rights.

_____ (1') Plaintiff, Joseph H. Mueller, an attorney for Plegge and Horgan, and Joseph B. Moore, an Assistant United States Attorney, appeared at the hearing. On December 21, 1998, the court of appeals denied plaintiff's petition for rehearing and petition for rehearing en banc. The mandate issued on January 5, 1999.

II. Discussion

A. Defendant's Motion to Dismiss

The purpose of a motion to dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure, is to test the legal sufficiency of the complaint. A complaint shall not be dismissed for failure to state a claim for which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim entitling him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The issue is not whether the plaintiff will ultimately prevail, but whether

the plaintiff is entitled to present evidence in support of his claim. Id. See also Neitze v. Williams, 490 U.S. 319, 327 (1989). In its motion to dismiss, defendant argues that plaintiff's complaint is barred by res judicata. Under that doctrine, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." Montana v. United States, 440 U.S. 147, 153 (1979); Coatner v. URS Consultants Inc, 153 F.3d 667, 673 (8th Cir. 1998) . Res judicata consists of two preclusion concepts: "issue preclusion" and "claim preclusion." The former refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. The latter refers to a judgment's effect in foreclosing litigation of a matter that has never been litigated, because of a determination that it should have been raised in an earlier suit, Tyus v. Shoemehl, 93 F.3d 449, 453 n.5 (8th Cir. 1096) (citing Migra v. Warren-City Sch- Dist Bd of Educ., 465 U.S. 75, 77 n. 1 (1984)), cert-denied, 117 S. Cr. 2427 (1997). Whether a party in the later suit may be said to be in privity, for res judicata purposes,

with a party in the earlier suit depends on whether their interests are "adequately congruent". Mills v Des.Arc Convalescent Home, 872 F.2d 823, 827 (8th Cir. 1989). The Court finds that the requirements for res judicata operation have been met in this case. Although couched in somewhat different terms, the claims that plaintiff raises here are essentially the same as those raised in Jiricko III. That is, they all relate to alleged wrongdoing by the lawyers in the filing of a summary judgment motion by the defendants in Jiricko II. See United States v. Guerley , 43 F.3d 1188, 1199 (8th Cir. 1994) ("Whether the present action is the same cause of action' as the prior action depends on whether it arises out of the same nucleus of operative facts as the prior claim."') (quoting Lane v. Peterson 899 F.2d 737, 742 (8th Cir.), cert-denied, 498 U.S. 823 (1990),cert. denied, S16 U.S. 817 (1995). There is no question that the Jiricko III court had jurisdiction, and that its order of dismissal "operate[d] as a rejection of . . . plaintiff's claims on the merits. Jaramillo v. Burkhart, 59 F.3d 78, 79 (8th Cir. 1995). Finally, although

Moser and Marsalek, P.C., the defendant in this case, was not named an a defendant in Jiricko III, the Court notes that two of that firm's lawyers, that is Messrs. Plegge and Horgan, were sued in that case. That their interests may be deemed "congruent" is, in the Court's view, not a debatable issue. The Court will grant defendant's motion.

B. Defendants Motion for Protective Order.

Defendant has also moved for entry of a protective order similar to that issued against plaintiff by the Seventh Circuit in Jiricko v Lakin & Herndon, P.C., No. 93-398 (7th Cir. Jan. 11, 1996). Defendant argues that such an order is needed in order to forestall plaintiff from "continuing his practice of filing frivolous claims." The Court finds defendant's proposal to be premature, and believes it should proceed under Federal Rule of Civil Procedure 11. Subdivision (b) of Rule 11, Fed. R. Civ. P., states, in pertinent part, that by presenting a pleading to the court, an unrepresented party is certifying that to the best of his knowledge, information, and belief, he is not doing so for any improper purpose, such as harassment, and

that the claims and legal contentions contained in that pleading "arc warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." If a court believes that a party has violated subdivision (b), it may enter an order describing the specific conduct that appears to violate the subdivision of the Rule and direct the party to show cause why the described conduct does not constitute such a violation. Rule 11(c)(1)(B), Fed. R. Civ. P.; See Johnson v. Waddell & Reed, Inc., 74 F.3d 147, 151 (7th Cir. 1996). If, after giving that party notice and a reasonable opportunity to respond, the court may impose a monetary or other sanction, "sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Rule 11(c)(2), Fed. R. Civ. P. After a thorough review of the record, the Court believes that plaintiff may have filed this lawsuit for the sole purpose of harassing defendant. Buttressing the Court's belief is the fact that this case comes on the heels of a suit involving the same set of facts brought by plaintiff against defendant's

employees. That suit, as explained above, was dismissed as meritless. Plaintiff offers no argument as to why he believes if he had sued defendant here in that earlier action (i.e., Jiricko III), a different result would have obtained. In sum, plaintiff appears to be attacking defendant merely because its lawyers represented parties whom he sued in another lawsuit. The Court also is of the opinion that the claims raised by plaintiff are warranted neither by existing law nor by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. Plaintiff seems to believe that any person who files a complaint is thereby automatically entitled to a trial by jury, and that a defendant's filing of a summary judgment motion gives rise to a cause of action. However, the filing of summary judgment motions is part of the ordinary practice of law, and Rule 56 (c) , Fed. R. Civ. P., specifically provides that " the judgment sought shall be rendered forthwith it the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to judgment as a matter of law." The United States Supreme Court long ago declared that summary judgment, applied properly, does not violate the Seventh Amendment. Fidelity & Deposit Co.,v. United States ex. rel. Smoot, 187 U.S. 315, 319-21 (1902). While a court generally affords pro se filings a liberal construction, a litigant's pro se status does not excuse him from reading the Federal Rules of Civil Procedure. See McNeil v, United States, 508 U.S. 106, 113 (1993) (" [W] e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel."). This is especially true in plaintiff's case, for he is both an educated individual, and, as the record indisputably shows an experienced litigant. Accordingly, IT IS HEREBY ORDERED that defendant's motion to dismiss [#8-1] is granted, and that plaintiff's motion to strike defendant's motion to dismiss [#13] is denied.

IT IS FURTHER ORDERED that defendant's motion for protective order [#8-2] is denied.

IT IS FURTHER ORDERED that plaintiff shall show cause, in writing, no later than March 26, 1999, why his conduct in filing this lawsuit has not violated Rule 11, Fed. R. Civ. P., and why appropriate sanctions should not be imposed. The Court warns plaintiff that no extension of that deadline will be granted. Although the Court is granting the motion to dismiss, it will direct the Clerk not to enter judgment in this matter at this time. The Court will retain jurisdiction and will enter a separate judgment only after the sanctions issue is resolved.

_____ signature,

Catherine D. Perry, United States District Judge

The Court notes that in addition to litigating in this district and the Southern District of Illinois, plaintiff has also been involved in litigation in the federal district court in Kansas. See Jiricko v. Coffeyville Mem. Hosp. Med. Center, 700 F.Supp- 1559 (D. Kan. 1988); Jiricko v. Coffeyville Mem. Hosp. Med. Center , 628 F.Supp. 329, 333 (D. Kan. 1965).

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MILOS J. JIRICKO, M.D.,
Plaintiff

Filed APR 0 8 1998
U S. DISTRICT COURT
E. DIST. OF Mo.
ST. LOUIS

Vs. No. 4:97CV01787 ERW

BRIAN R. PLEGGE, a lawyer; PATRICK J. HORGAN, a lawyer; and WILLIAM D. STIEHL, a federal officer and judge, United States District Court for Southern District of Illinois, East St. Louis, IL in his official and individual capacity,
Defendants

MEMORANDUM AND ORDER

This matter is before the Court following a hearing on defendants' motion to dismiss. The hearing was held Wednesday March 25, 1998, with all parties present and arguing before the Court. The present suit related to several other court proceedings instituted by plaintiff in the courts of the Seventh Circuit. First, plaintiff filed a case styled Jiricko v. Illinois Anesthesia, ("Jiricko I") No. 91CV00092 WDS in the United States District Court for the Southern District of Illinois. This lawsuit involved a dispute between plaintiff and his former employer. During the course of the case, and at an

early stage, plaintiff's attorneys requested leave to withdraw and were allowed to do so by the Court on January 2, 1992. After that, the Court gave plaintiff 30 days to find new counsel or enter an appearance pro se. This time limit was extended several times by the Court, with the warning that failure to do one or the other would cause a dismissal for want of prosecution. Months later, on June 24, 1992, after plaintiff's non-compliance with every deadline and extension, plaintiff's case was dismissed by the Court. Plaintiff appealed, and the dismissal was affirmed. Next, plaintiff filed a lawsuit against his former attorneys (the ones granted leave to withdraw in Jiricko I) in Jiricko v. Lakin and Herndon, P.C. et al., ("Jiricko II") No. 93CV00398 WDS, also in the Southern District of Illinois. In that case, current defendants Brian R. Plegge and Patrick J. Horgan represented defendants Lakin, et al. Current defendant William D. Stiehl was the federal judge presiding over Jiricko II. In Jiricko II, defendants Plegge and Horgan filed a motion for summary judgment, which, after full briefing by both sides, was granted in a Memorandum and

order by Judge Stiehl on September 19, 1994. Plaintiff again filed an appeal in the Seventh Circuit, and Judge Stiehl's ruling was affirmed. The Seventh Circuit agreed that it wasn't plaintiff's former attorneys who were at fault, but rather that his suit was dismissed due to his own refusal to follow the Court's orders long after his attorneys withdrew. In addition to the affirmance, the Seventh Circuit placed several restrictions on plaintiff's ability to file actions in their circuit because of Jiricko's "continual usurpation of judicial resources, and the resources of defendants, generating reams of paper and hours of toil." The case before this Court ("Jiricko III") is based on the occurrences in Jiricko II. Plaintiff's complaint appears to allege the following: (1) defendants Plegge and Horgan, because they filed the successful summary judgment motion, have deprived plaintiff of his constitutional right to a jury trial; (2) Judge Stiehl, because he granted the motion summary judgment deprived plaintiff of his constitutional right to a jury trial; (3) that all defendants conspired and did deprive plaintiff of his constitutional rights; and (4) Judge

Stiehl, by not holding a hearing on the summary judgment motion violated plaintiff's constitutional rights. In passing on a motion to dismiss, the Court must view the facts alleged in the Complaint in the light most favorable plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Conley v. Gibson, 355 U.S. 41, 45-46 (1957) ; Tombs v. Bell, 798 F.2d 297, 298 (8th Cir. 1986). The Court should not grant a motion to dismiss merely because the complaint does not state with precision every element necessary for -recovery. Roberts v. Walmart Stores, Inc., 736 F.Supp. 1527, 1528 (E.D. Mo. 1990). "A complaint is sufficient if it contains allegations from which an inference can be drawn that evidence on these material points will be introduced at trial. id. (internal quotations and citation omitted). Therefore, a motion to dismiss a complaint should not be granted unless it appears beyond doubt that plaintiffs can prove no set of facts which would entitle plaintiffs to relief. Coleman v. Watt, 40 F.3d 255, 258 (8th Cir. 1994). The Court notes chat it gives plaintiff's pro se complaint the benefit of a liberal construction. Haines v. Kerner, 404 U.S.

51-9, -520 (11972). At the same time pro se plaintiffs are required to follow the Federal Rules of Civil Procedure. Farnsworth v. City of Kansas City, Mo., 863 -7.2'd 33, 34 (8th Cir. 1988) (per curiam) . Courts do not "blindly accept the legal conclusions drawn by the pleader from the facts." Westcott v. City of Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990). A review of plaintiff complaint shows that he is again advancing certain indisputably meritless legal theories that have been previously ruled and rejected on both the circuit and appellate level in the Seventh Circuit. Plaintiff's only new twist to his repetitive allegations is that now the attorneys and the judge are somehow liable for performing their duties as officers of the Court. It is apparent from his filings, and from his appearance before this Court at the hearing that plaintiff does not understand the provisions of the Constitution or simply refuses to acknowledge the previous judgments against him on his claims. In any event, plaintiff's complaint' fails to state a cause of action and must be dismissed.

I. Judge Stiehl's Motion to Dismiss

Judge Stiehl argues that plaintiff's complaint must be dismissed because he is protected by judicial immunity. Judicial immunity shields judges from individual liability for "acts committed within their judicial jurisdiction." Cleavinger v. Saxner, 476 U.S. 199 (1985), quoting Pierson v. Ray , 386 U.S. 547, 553-54 (1967). A judge will only be subject to liability when he has "acted in the clear absence of all jurisdiction". The court finds that plaintiff's claims against Judge Stiehl are barred by the doctrine of absolute judicial immunity. Judges are absolutely immune from suit for damages arising out of the performance of their judicial duties, such as plaintiff alleges. Stump v. Sparkman, 435 U.S. 349 (1078); Martin v. Aubuchon,623 F.2d 1282, 1285 (8th Cir. 1980). Plaintiff's complaint against Judge Stiehl is dismissed.

II. Plegge and Horgan's Motion to Dismiss

Plaintiff's allegations against defendants Plegge and Horgan similarly lack any basis upon which relief could be granted. While neither Plegge nor Horgan are entitled to judicial

immunity, they are protected from suits arising from their actions as officers of the Court performing their professional duties. See Collins v. Kalden, 613 F. Supp. 1306, 1313 (N.D. GA 1985). Any inability of plaintiff to have his case against the defendants in Jiricko II proceed to trial was not caused by any impropriety on the part of defendants, but rather the lack of a material issue to be put before the court by plaintiff himself. By submitting a successful motion for summary judgment, to which plaintiff did have the opportunity to respond and contest, defendants Plegge and Horgan have not deprived plaintiff of his constitutional rights. Id. Plaintiff has failed to state a claim against defendants Plegge and Horgan upon which relief can be granted. First, he fails to allege any facts which indicate that he acted under color of state law. Next, these defendants are alleged only to have acted in the capacity of private, retained attorneys, who are admitted to practice before the United States District Courts. These facts, including their bar membership, their status as attorneys, and their actions in filing motions, do not constitute state action

for the purposes of § 1993. Dunn v. Hackworth, 628 F.2d 1111 (8th Cir. 1980). Plaintiff's claims against these defendants are dismissed. Finally, defendants also ask this Court to impose restrictions similar to those issued by the Seventh Circuit. At this time the Court declines to enter an order restricting plaintiff's future filings. Accordingly, IT IS HEREBY ORDERED that the motion of defendant Stiehl to dismiss [document # 12] is GRANTED. IT IS FURTHER ORDERED that the motion of defendants Plegge and Horgan to dismiss [document #8] is GRANTED. IT IS FURTHER ORDERED that all other pending motions are DENIED as moot.

An appropriate order of Dismissal shall accompany this Memorandum and Order. Dated this 8th Day of April, 1998.

_____ signature

E. RICHARD WEBBER
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED

No. 99-524

In The

Supreme Court of the United States

MILOS J. JIRICKO, M.D.,

Petitioner,

vs.

MOSER AND MARSALEK, P.C.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Did the United States Court of Appeals properly affirm the judgment of the district court dismissing Petitioner's claim against the defendant employer, which was based on a respondeat superior theory of liability for the acts of its employees, because Petitioner's prior suit against the individual employees for the same acts resulted in a judgment in favor of the employees, and the doctrine of res judicata prevents relitigation of Petitioner's claims.

CORPORATE LISTING

Moser and Marsalek, P.C., is a Missouri professional corporation. Moser and Marsalek, P.C., has no parent or subsidiary companies.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Moser and Marsalek, P.C., respectfully suggests that the Court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Eighth Circuit. The Opinion is unpublished. *Jiricko v. Moser and Marsalek, P.C.*, 187 F.3d 641, 1999 WL 427336 (8th Cir. June 24, 1999).

STATEMENT OF CASE

The present case is related to several court proceedings instituted by the Petitioner in the courts of the Seventh and Eighth Circuits. The first lawsuit was entitled *Jiricko v. Illinois Anesthesia Ltd.*, and was filed in the United States District Court for the Southern District of Illinois, No. 91-CV-00092 WDS (*"Jiricko I"*). This lawsuit involved an employment dispute between the Petitioner and his former employer, Illinois Anesthesia. Petitioner was represented by members of the Lakin & Herndon, P.C., law firm during the initial stages of *Jiricko I*. During the case, the Lakin & Herndon, P.C., law firm and its members obtained leave of Court to withdraw from their representation of Petitioner. Petitioner then refused to obtain new counsel and six months later, his claim against his employer was dismissed for want of prosecution. The United States Court of Appeals for the Seventh Circuit affirmed that dismissal in *Jiricko v. Illinois Anesthesia Ltd.*, Nos. 92-2613, 92-2682 (Seventh Circuit, August 27, 1993) unpublished Order 1993 WL 326697 (referenced in "Table of Decisions Without Reported Opinions" at 4

F.3d 996). In its Order, the Seventh Circuit imposed sanctions against Petitioner for filing frivolous motions.

The second lawsuit was filed on June 10, 1993, by Petitioner pro se against his former attorneys, the Lakin & Herndon, P.C., law firm and members of that firm, in the United States District Court for the Southern District of Illinois, 93-CV-398-WDS styled *Jiricko v. Lakin & Herndon, P.C.*, et al. (*"Jiricko II"*). In *Jiricko II*, Petitioner attempted to state a claim for legal malpractice, fraud and conversion against his former attorneys for their alleged failure to pursue the original conversion claim against his former employer, Illinois Anesthesia Ltd. Attorneys Brian R. Plegge and Patrick J. Horgan entered their appearance on behalf of defendants Lakin & Herndon, P.C., and members of that law firm in *Jiricko II*. On behalf of their clients, Mr. Plegge and Mr. Horgan filed a motion for summary judgment and supporting memorandum of law. The motion for summary judgment was granted by the Honorable William D. Stiehl on September 19, 1994, in a memorandum opinion.

Petitioner then filed a second appeal with the Seventh Circuit Court of Appeals arising out of Judge Stiehl's granting of the summary judgment motion filed by Mr. Plegge and Mr. Horgan in *Jiricko II*. On November 15, 1995, the Seventh Circuit entered an unpublished order affirming the summary judgment of Judge Stiehl in *Jiricko II*. *Jiricko v. Lakin & Herndon, P.C.*, No. 94-3344, 1195 WL 623825 (7th Cir. Nov. 15, 1995) (referenced in a "Table of Decisions Without Reported Opinions" at 69 F.3d 539). The Seventh Circuit stated that in the underlying legal malpractice claim, Petitioner had caused the District

Court to "spend scarce resources on hearing one irrelevant motion after another and was held to make repetitious explanations about pretrial procedures, conversion and malpractice." (*Id.* at 3). The Seventh Circuit, on its own motion, gave Petitioner fourteen days within which to show cause why it should not impose sanctions for filing a frivolous appeal. (*Id.* at 2). Petitioner did not respond to the show cause order. Thereafter, on January 11, 1996, the Seventh Circuit issued an order sanctioning Petitioner for the second time. In its Order, the Seventh Circuit prevented Petitioner from filing any papers in any federal court in the Seventh Circuit, excluding criminal and habeas corpus proceedings "unless petitioner first filed a motion for leave to file attaching certain specified documents, including a sworn affidavit certifying that the matters raised in the proposed filing are not frivolous and have not been raised by him in prior suits." *Jiricko v. Lakin & Herndon, P.C.*, No. 93-398 (7th Cir. Jan. 11, 1996) slip order at 1-2.

In response to the Seventh Circuit's Opinion and Order in *Jiricko II*, Petitioner filed a Petition for Writ of Certiorari styled *Milos J. Jiricko v. Lakin & Herndon, et al.*, Docket No. 95-1394, Application No. A-641. This Court denied Petitioner's Petition for Writ of Certiorari. *Jiricko v. Lakin & Herndon, P.C.*, 517 U.S. 1137 (1996).

On August 29, 1997, Petitioner filed another complaint, this time in the United States District Court for the Eastern District of Missouri styled *Jiricko v. Plegge*, Cause No. 4:97CV01787 ERW naming Brian Plegge, Patrick Horgan, and Judge Stiehl as Defendants ("*Jiricko III*"). In *Jiricko III*, Petitioner alleged that Brian Plegge and Patrick Horgan (the attorneys who represented the Defendants in

Jiricko II) and Judge Stiehl conspired to deprive Petitioner of his constitutional rights, wrongfully deprived him of his right to due process and his right to a jury trial, and denied him the equal protection of the laws. Petitioner based those claims on the following two facts: (1) Plegge and Horgan filed the summary judgment motion in *Jiricko II*; and (2) Judge Stiehl granted the motion. All of the Defendants in that case moved to dismiss Petitioner's complaint. On April 18, 1998, after briefing and a hearing, the Honorable E. Richard Webber granted the Defendants' motions to dismiss and dismissed Petitioner's complaint with prejudice in his memorandum and order. Petitioner appealed the dismissal of this complaint to the United States Court of Appeals for the Eighth Circuit. The United States Court of Appeals for the Eighth Circuit affirmed Judge Webber's Memorandum and Order dismissing Petitioner's complaint in an unpublished per curiam decision. *Jiricko v. Plegge, et al.*, No. 98-2096, 1998 WL 761897 (8th Cir. Nov. 3, 1998). Petitioner did not seek a writ of certiorari in *Jiricko III*.

On November 12, 1998, Petitioner filed another lawsuit in the United States District Court for the Eastern District of Missouri against Moser and Marsalek, P.C., Case No. 4:98CV01893 CDP (*"Jiricko IV"*). In this lawsuit, the Petitioner contended that Defendant Moser and Marsalek, P.C., was liable because its agents, Brian Plegge and Patrick Horgan, deprived Petitioner of his constitutional rights by filing the motion for summary judgment in *Jiricko II*, the underlying legal malpractice case. However, as set forth above, the propriety of the summary judgment was previously litigated in *Jiricko II* in the District Court for the Southern District of Illinois and on appeal

in the Seventh Circuit. In addition, Petitioner's allegations that he was denied his constitutional rights by virtue of the motion for summary judgment were previously litigated in *Jiricko III* by the United States District Court for the Eastern District of Missouri and affirmed by the Eighth Circuit. On December 3, 1998, the Defendant, Moser and Marsalek, P.C., filed a motion to dismiss. On March 2, 1999, after briefing by both parties, Judge Perry of the United States District Court for the Eastern District of Missouri sustained the motion to dismiss. Furthermore, Judge Perry ordered Petitioner to show cause, no later than March 26, 1999, why the filing of this lawsuit was not frivolous and why appropriate sanctions should not be imposed. Thereafter, on April 6, 1999, the district court entered a judgment dismissing Petitioner's claim with prejudice and imposed sanctions against Petitioner by permanently enjoining Petitioner from filing any papers in the Eastern District of Missouri, excluding criminal and habeas corpus proceedings, unless he first files a "motion pursuant to court order seeking leave to file." Petitioner then appealed the judgment of Judge Perry to the United States Court of Appeals for the Eighth Circuit. On June 24, 1999, the United States Court of Appeals for the Eighth Circuit affirmed the trial court's dismissal of Petitioner's claims against Moser and Marsalek, P.C. *Jiricko v. Moser and Marsalek, P.C.*, 187 F.3d 641, 1999 WL 427336 (8th Cir. June 24, 1999).

Petitioner has once again filed a Petition for Writ of Certiorari with this Court based on his claim that he was denied his constitutional rights based on the successful

motion for summary judgment that was filed in *Jiricko II*, the underlying legal malpractice claim.

REASONS FOR DENYING THE WRIT

I. The United States Court of Appeals for the Eighth Circuit Correctly Affirmed the Judgment of the District Court Dismissing Petitioner's Claims Against Defendant Moser and Marsalek, P.C., Based on the Actions of Moser and Marsalek, P.C.'s Employees Because Petitioner Was Barred From Re-litigating These Claims Under the Doctrine of Res Judicata in that a Prior Case Brought By Petitioner Against the Employees Resulted in a Final Judgment on the Merits in Favor of the Employees and Against Petitioner.

The sole issue in this case concerns the district court's dismissal of *Jiricko IV*, because it failed to state a claim for which relief can be granted based on the application of res judicata and the Eighth Circuit's affirmation of the district court's judgment. This issue is simply not one for which this Court should exercise its discretion.

United States Supreme Court Rule 10 states that "[a] petition for a writ of certiorari will be granted only for compelling reasons. One of such reasons, although not controlling, is that "a United States court of appeals . . . has so far departed from the usual and accepted course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. . . . " S. Ct. R. 10(a). However, Rule 10 also states that "[a] petition for a writ of certiorari is rarely granted when the asserted error

consists of . . . the misapplication of a properly stated rule of law." This case contains no issues falling within the purview of Rule 10 and therefore Petitioner's Petition for Writ of Certiorari should be denied.

Initially, it must be noted that in his Petition for Writ of Certiorari, Petitioner raises issues with regard to the propriety of the dismissal of *Jiricko III* (*Jiricko v. Plegge*, No. 4:97CV01787 ERW) and *Jiricko IV* (*Jiricko v. Moser and Marsalek, P.C.*, No. 4:98CV1893 CDP). The dismissal of *Jiricko III* was affirmed by the Eighth Circuit in an unpublished order. *Jiricko v. Plegge*, No. 98-2096, 1998 WL 761897 (8th Cir. Nov. 3, 1998). Petitioner did not file a timely Petition for Writ of Certiorari with respect to the dismissal and subsequent affirmation of the dismissal of *Jiricko III*. Accordingly, the issues raised regarding the propriety of the orders entered in *Jiricko III* are not properly before this Court. Supreme Court Rule 13.

The issues raised with respect to *Jiricko IV* do not fall within the purview of Supreme Court Rule 10. The dismissal of *Jiricko IV* by the district court and the affirmation of the dismissal by the Eighth Circuit Court of Appeals properly adhered to the law in finding that Petitioner failed to state a claim upon which relief may be granted in *Jiricko IV*.

A. The Dismissal of Petitioner's Claims in *Jiricko IV* Adhered to All Procedural Requirements and Satisfied Petitioner's Right to Due Process.

Petitioner argues in his Petition for Writ of Certiorari that his constitutional right to due process was violated because Respondent filed a motion to dismiss and not a

"pleading." (*See* Petition, pp. 7-11). Rule 12 of the Federal Rules of Civil Procedure expressly permits a party to present in a motion the defense of failure to state a claim upon which relief can be granted. Federal Rules of Civil Procedure 12(b)(6). Moreover, the defense of res judicata may be raised by a motion to dismiss under Rule 12(b)(6). *See Williams v. Murdoch*, 330 F.2d 745 (3rd Cir. 1964), and *Jones v. Gann*, 703 F.2d 513 (11th Cir. 1983).

In addition to the adherence to the procedural rules and substantive law, it is clear from the record below that Petitioner was afforded due process. Respondent's motion to dismiss and memorandum in support were filed on December 3, 1998. The motion included as exhibits all pertinent pleadings, orders and decisions from Petitioner's prior litigation. Petitioner was granted until January 25, 1999, to file a response to the motion. Petitioner filed his brief in response to the motion to dismiss on January 22, 1999. Thereafter, Respondent filed a reply and Petitioner was permitted to file an additional brief. On March 1, 1999, the district court granted the motion. The Petitioner appealed to the United States Court of Appeals for the Eighth Circuit. After Petitioner filed his brief, the Eighth Circuit affirmed the judgment of the district court.

The purpose of a motion to dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure, is to test the legal sufficiency of the complaint. The motion shall not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim entitling him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The issue is not whether the plaintiff will ultimately

prevail, but whether the plaintiff is entitled to present evidence in support of his claim. *Id. See also Neitzi v. Williams*, 490 U.S. 319, 327 (1989). In the present case, the doctrine of res judicata barred Petitioner from presenting further evidence and re-litigating his claims.

The Respondent filed a detailed motion to dismiss delineating why the Petitioner's claims were barred. The motion was accompanied by the pleadings, orders and opinions from the prior cases that demonstrated that the Petitioner's current claims were previously litigated and decided against him. Based on the record before the district court and appellate court, it was clear that the prior judgments and decisions barred Petitioner from re-litigating the claims raised in his current lawsuit.

B. The District Court and United States Court of Appeals for the Eighth Circuit Properly Applied the Doctrine of Res Judicata in Finding that Petitioner was Barred from Re-litigating His Claim.

It is well-settled that where a party has already once litigated an issue and has lost, he may not thereafter re-litigate the same issue in another court. Under the doctrine of res judicata, "a final judgment on the merits bars further claims by parties or their privities based on the same cause of action." *Montana v. United States*, 440 U.S. 147, 153 (1979); *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 673 (8th Cir. 1998). The doctrine of res judicata consists of two preclusion concepts: issue preclusion and claim preclusion. *Migra v. Warren City School Dist. Board of Education*, 465 U.S. 75, 77 n. 1 (1984). Under claim preclusion, a final judgment on the merits bars further claims

by the parties or their privities based on the same cause of action. *United States v. Gurley*, 43 F.3d 1188, 1195 (8th Cir. 1994). Under issue preclusion, or as it is sometimes called, collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, 'the determination is conclusive in a subsequent action between the parties whether on the same or different claim.' " *Tyus v. Schoemehl*, 93 F.3d 449, 453 (8th Cir. 1996), (quoting Restatement (2nd) Judgments, § 27 (1982)). Issue preclusion will also bar re-litigation of an issue by one who, although not a party to the original suit, is in privity with the party to that suit. *See Oldham v. Pritchett*, 599 F.2d 274, 276 n. 1 (8th Cir. 1979). Whether a party in the later suit may be said to be in privity with a party in the earlier suit, for res judicata purposes, depends on whether their interests are "adequately congruent." *Nome v. Des. Arc Convalescent Home*, 872 F.2d 823, 827 (8th Cir. 1989).

As the Eighth Circuit Court of Appeals and the district court found, the requirements for res judicata have been met in this case. Although couched in somewhat different terms, the claims that Petitioner raised in *Jiricko IV* are essentially the same as those raised in *Jiricko III*. That is, they all relate to the alleged wrongdoing by the lawyers in the filing of a summary judgment motion on behalf of the defendants in *Jiricko II*. *See United States v. Gurley*, 43 F.3d 1188, 1195 (8th Cir. 1994) ("whether the present action is the 'same cause of action' as the prior action depends on whether it 'arises out of the same nucleus of operative facts as the prior claims.' ") (quoting *Lane v. Peterson*, 899 F.2d 737, 742 (8th Cir. 1990), *cert. denied*, 498 U.S. 823 (1990). There is no question that the court in *Jiricko III* had jurisdiction and that its order of

dismissal "operate[d] as a rejection of . . . plaintiff's claims on the merits." *Jaramillo v. Berkhart*, 59 F.3d 78, 79 (8th Cir. 1995). Finally, although Respondent Moser and Marsalek, P.C., the defendant in this case, was not named as a defendant in *Jiricko III*, its employees, Brian Plegge and Patrick Horgan, were named as defendants. It is well-settled that where the claim against the employer is premised on respondeat superior, the plaintiff cannot recover against the employer if the employee has been found immune and therefore the plaintiff does not have grounds against the employer. *State ex rel. City of Fenton v. Hamilton*, 941 S.W.2d 785, 789 (Mo. App. W.D. 1997). As the court explained: "The employee's exoneration from liability necessarily exonerates the employer." *Id.* Furthermore, the interest of Messrs. Plegge and Horgan and Moser and Marsalek, P.C., may be deemed "congruent."

The district court and Eighth Circuit Court of Appeals correctly applied the law of res judicata in determining that Petitioner's claims in *Jiricko IV* are barred by the doctrine of res judicata and properly dismissed his claim. Petitioner was afforded his right to due process.

CONCLUSION

The Petition for Writ of Certiorari should be denied because the issues raised by Petitioner have previously been resolved by this Court and uniformly by the United States Courts of Appeal. The United States Court of Appeals for the Eighth Circuit correctly followed the precedents of this Court and other courts and there is no

reason why the Petition merits further review. The Petition presents no important question of federal law nor any conflicts among or between the circuit courts of appeal and state courts of last resort. For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1999

MILOS J JIRICKO MD — PETITIONER

v.

MOSER & MARSALEK PC — RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES APPEALS COURT FOR EIGHTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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RP

QUESTION PRESENTED

Whether, the United States citizen's Constitutional rights to due process of law and,

Whether, the direct written mandate of the United States Supreme Court and the Federal Rules of Civil Procedure may be bypassed without the Supreme Court intervention.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

I, the Petitioner, have received the 'Respondent's Brief in Opposition' on October 27th 1999, p.m. I respectfully submit this reply to demonstrate that the respondent's 'Brief in Opposition' has not been filed in order to promote the administration of justice but only **to avoid the justice**.

The Respondent is frankly contemptuous by suggesting that..."This issue"... violation of due process and violation of the Federal Rules of Civ. Procedure "is simply not one for which this Court should exercise its discretion"; [Respondent Brief at 6].

The Supreme Court declared that the purpose of Court Rules is to insure uniformity and timely adjudication;
[Duncan v. Louisiana, 391 U.S. 170];
[Hanna v. Plumer, 380 U.S.450].

Such judgment is then clearly trivialized by the respondent's notion that they can blatantly disregard the Rules and the Rules specific terms at their whim while hiding behind a plethoric verbiage. The Supreme Court has precisely ordered a procedure to be followed and there is absolutely no doubt that this procedure has been blatantly violated.

Respondent's statement that *"dismissal of Petitioner's Claim in Jiricko IV adhered to all procedural requirements and satisfied Petitioner's Rights to Due Process"* is false; [Respondent Brief at 7]; [Carey v. Piphus, 435 U.S. 247].

i. Federal Rules of Civ. Procedure are authorized by Rules Enabling Act which provides that Supreme Court shall have power to prescribe the forms of process, pleadings and motions; [Hanna v. Plumer, 380 U.S.450]. Hence, ordering the manner in which the claimant is to plead Res Judicata at the United States district courts relates to practice and procedure of the district courts and it is valid and constitutional exercise of the Supreme Court power; [Hanna v. Plumer, 380 U.S. 450].

ii. There is no doubt that F.R.C.P., Rule 12 (b) cited by the respondent does not list in its subdivisions (1) through (6) Res Judicata as the defense available under the Rule 12 (b).

iii. There is no doubt that F.R.C.P., Rule 8 specifically demands that the defense of Res Judicata is submitted by pleading, expressly requiring the claimant either to deny or admit the plaintiff Complaint's allegations.

iv. There is absolutely no doubt that F.R.C.P., Rule 8 is valid procedural rule and that it fully controls the instant case No: 4-98CV01893 CDP; [Palmer v. Hoffman, 318 U.S. 109].

Whether some federal courts erroneously disregarded the F.R.C.P., Rule 8 constitute no mandate of the United States Supreme Court; United States federal courts clearly held:

Federal Civil Procedure 1775. Defense of res judicata could not be raised on motion to dismiss; F.R.C.P., Rule 12(b); [Foye v. United A.G. Stores Coop., 336 F. Supp. 82]

Such ruling is constitutional, jurisdictional and logical.

"COMES NOW defendants Moser & Marsalek PC and for its Motion to dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12 (B)"...; [Petitioner's Brief at 8].

The defendants' motion to dismiss is self-explanatory.

Constitution Art III and 28 U.S.C. & 1332 limit the federal court jurisdiction only to cases or controversies. Thus, for the federal court to rule upon a new issue..."**in addition**" to the perimeter of the defenses strictly enumerated by the F.R.C.P., Rule 12 (b), that is whether plaintiff's complaint No: 4-98CV01893 CDP may be barred by the doctrine of Res

Judicata without the requisite pleading submitted by the claimant under the Rule 8 disputing or confessing the allegations of the Complaint - federal court would have to usurp the jurisdiction to do so; [Constitution Art III; 28 U.S.C. & 1332; Johnson v. Zerbst, 304 U.S. 45]. Petitioner respectfully evidenced in his submissions that granting the Res Judicata upon his Complaint No: 4-98CV01893 CDP infringed upon the plaintiff's substantial and procedural due process of law and that it is unconstitutional.

v. "The Respondents filed a detailed motion to dismiss delineating why the Petitioner's claims were barred. The motion was accompanied by the pleadings, orders and opinions from the prior cases",....[Respondent's Brief at 9].

In its motion to dismiss, defendant argues that plaintiff's complaint is barred by res judicata; [Exhibit B].

A motion to dismiss is properly treated as a motion for summary judgment under F.R.C.P., Rule 56 where, in order to decide the motion, the trial court must consider documents submitted in support of the motion as well as the pleadings; [61 Am Jur 2d at 590].

vi. There is no doubt that the respondent himself fully evidenced before the Supreme Court that their motion to dismiss originally filed by the defendants under the Rule 12 (b)

was definitely converted into the motion for summary judgment by the court; F.R.C.P., Rule 12 (b) & Rule 56; [Appendix B]; [American Jurisprudence 2d].

vii. Here, however, the defendants have filed no requisite pleading confessing to the facts, a cause of action pleaded in the Complaint No: 4-98CV01893 CDP and failed to properly plead the affirmative defense of avoidance including the issue of material facts applicable under the F.R.C.P.,Rule 56

Here, the procedural safeguards due to the plaintiff pro se were only further and severely disregarded.

Our jurisprudence requires at least this; that an adverse party be given express, ten day notice of the summary judgment rules, of his right to file affidavit or other materials in opposition to the motion and of the consequence of default; [Somerville v. J. C. Hall, 2 F3d 1564].

Here, **No Notice,** requisite under the F.R.C.P., Rule 12 (d) and F.R.C.P., Rule 56 has ever been furnished to the plaintiff and the district court acted in biased manner.

Clearly, while the Court favorably overlooked the Federal Rules applicable to the defendants, the court then ignored the federal procedural safeguards and the plaintiff's due process of

law rights and further, sua sponte applied the very same rules it disdained, as a sword to punish and to ostracize this innocent litigant pro se [Appendix B].

[o]ur system of law has always endeavored to prevent even the probability of unfairness;
[In Re Murchison, 349 U.S.136].

In conclusion, it is wholly evident that the full jurisdiction of the United States Supreme Court only brightly shines here. This Petitioner pro se has the absolute right to rely upon the United States Supreme Court written declaration.

Res Judicata upon the case No: 4-98CV01893 CDP is not constitutionally available. The Supreme Court of the United States ruling of the F.R.C.P., Rule 8 motion is a valid federal rule and to bypass the Federal Rules of Civil Procedure or the litigant's pro se due process of law will not be tolerated by the Supreme Court of the United States. Respondent by his own 'Brief in Opposition' only further evidenced before the Supreme Court the compelling need of the United States Supreme Court's action.

I, the Petitioner, most respectfully pray that the Supreme Court grant Certiorari to review the issues.

Respectfully Submitted.

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